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Reasons for decision

Robert Thibault,

complainant,

and

Canadian Union of Postal Workers,

respondent.

Board File: 29994-C

Neutral Citation: 2014 CIRB 711

February 4, 2014

The Canada Industrial Relations Board (the Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. André Lecavalier and Norman Rivard, Members.

Parties' Representatives of Record

Mr. Robert Thibault, on his own behalf;

Mr. Christian Martel, for the Canadian Union of Postal Workers.

These reasons for decision were written by Mr. Graham J. Clarke, Vice-Chairperson.

I. Nature of the Complaint

[1] Section 16.1 of the *Canada Labour Code (Part I—Industrial Relations) (Code)* provides that the Board may decide any matter before it without holding an oral hearing. Having reviewed all of the material on file, the Board is satisfied that the documentation before it is sufficient for it to determine this complaint without an oral hearing.

[2] On May 16, 2013, the Board received a complaint from Mr. Robert Thibeault in which he alleged that his bargaining agent, the Canadian Union of Postal Workers (CUPW), had applied its standards of discipline to him in a discriminatory manner, contrary to section 95(g) of the *Code*:

95. No trade union or person acting on behalf of a trade union shall

...

(g) take disciplinary action against or impose any form of penalty on an employee **by applying to that employee in a discriminatory manner the standards of discipline of the trade union.**

(emphasis added)

[3] In his complaint, Mr. Thibeault contests disciplinary action taken against him. He argues that earlier amendments to CUPW's national constitution had abolished the Local Disciplinary Committee (LDC) that took the disciplinary action. Mr. Thibeault suggests that the LDC's decision was, in his words, "*ultra vires*."

[4] CUPW argues that, while LDCs were abolished, they were still authorized to decide any pending matters predating the amendments to the national constitution.

[5] The Board has decided to dismiss Mr. Thibeault's complaint on the basis that the issue does not fall within the scope of section 95(g) of the *Code*. While the Board can examine whether a trade union has applied its standards of discipline in a discriminatory manner, it is not the proper forum to determine the validity or proper interpretation of amendments made to the union's constitution.

[6] Even if the Board were able to make what would essentially be a declaration as to the "legality" of certain measures ostensibly taken under CUPW's constitution, Mr. Thibeault did not provide any evidence of discrimination against him specifically, as compared with other CUPW members in a similar situation.

II. Chronology of Events

[7] The following is a description of the key events as summarized in the parties' pleadings.

A. September 2011

[8] In September 2011, article 8 of CUPW's national constitution contained provisions providing for three types of disciplinary committees: local, regional and national. The relevant complaints against Mr. Thibeault fell under the jurisdiction of an LDC.

B. October 2011

[9] At its October 2011 convention, CUPW amended sections 8.04 and 8.05 of its national constitution in order to abolish LDCs:

BE IT FURTHER RESOLVED that the local disciplinary committee provided for in sections 8.04 and 8.05 be eliminated.

C. January 2012

[10] CUPW alleges that in January 2012, subsequent to the amendments to its national constitution, it adopted an interpretation of article 8 that held that the previous LDC process would continue to apply to any complaints pending at the time of the October 2011 amendments. CUPW described its interpretation as follows:

With respect to the complaints filed under article 8, all those filed prior to the adoption of the amendments at the Convention will be dealt with in accordance with the procedure set out in the National Constitution 2008-2011, while those filed after the adoption of the new procedure (2011 Convention, October 24 to 28) will be dealt with in accordance with that procedure.

(translation)

[11] Mr. Thibeault disputes, firstly, the fact that CUPW made any such decision and, secondly, the legal impact of that alleged decision on the proper interpretation of the national constitution.

D. May 1, 2012

[12] On May 1, 2012, the LDC held a hearing into various complaints involving Mr. Thibeault. CUPW alleges that Mr. Thibeault did not attend the hearing despite receiving notice in that regard. Mr. Thibeault alleges that he never received notice of the hearing.

[13] In its May 2012 decision, the LDC banned Mr. Thibeault from holding any union position for a period of six months unless he apologized in writing to the plaintiff.

The disciplinary committee made the following decision:

Whereas the accused failed to appear at the hearing of May 1, 2012,

1. Whereas, per our local constitution, 6.1, (c), 6.1, the accused has impeded the effective operation of the Local;
2. Whereas, per our national constitution, 8.01 (a) (b) (f), 8.01 no 5, the accused has impeded the effective operation of the Local;
3. Whereas, per our local constitution, 6.2 (b) (c) (d), the plaintiff has been aggrieved;
4. Whereas, per our national constitution, 9.10 (b) (j) (m), the accused failed to comply with the national constitution;

Now, therefore, the Local Disciplinary Committee directs the accused to provide the plaintiff with a written letter of apology within 15 days, with a copy to the Local Disciplinary Committee.

If, by the end of this period, the accused fails to comply with the reprimand, the Local Disciplinary Committee bans the accused from holding a position in the union or in a union local for a period of six months.

At the local level, the parties have 15 days to appeal after receipt of the Committee's decision (section 8.30).

That, henceforth, all discussions shall take place in a forthright and moderate manner and that parties to discussions shall take care to avoid any personal references or sarcastic language.

In closing, the Local Disciplinary Committee wishes to remind the parties that there is strength in union.

(translation; emphasis added)

[14] The parties dispute the date on which Mr. Thibeault received a copy of the LDC's decision. CUPW contends that Mr. Thibeault received the decision on May 31, 2012.

F. July 25, 2012

[15] When Mr. Thibeault failed to apologize, the LDC notified him that he was barred from holding any union position for six months, as indicated in its letter of July 25, 2012:

This letter is further to the hearing of this past May 1 at which you were directed to provide the plaintiff with a letter of apology, with a copy to the Committee, within 15 days.

Since you did not respond to the letter that we sent you on May 30 and that you received on May 31, we have no choice but to proceed, that is, to **bar you from holding any union position for a period of six months**, effective today, July 25, 2012.

(translation; emphasis added)

[16] Neither party's pleadings indicate exactly when Mr. Thibeault actually received a copy of this decision.

F. August 12, 2012

[17] On August 12, 2012, Mr. Thibeault wrote to CUPW's National Secretary-Treasurer, Mr. Georges Kuehnbaum, to appeal the LDC's decision, copying CUPW's National President, Mr. Denis Lemelin. CUPW received the letter on August 15, 2012.

[18] Mr. Thibeault asked Mr. Kuehnbaum that the LDC's decision be overturned, on the basis that an abolished body had no authority to act:

Hello Brother, National Secretary-Treasurer, this is to ask you to declare *ultra vires* a decision made on July 25, 2012, by three members of the union local of which I am President and also to declare that the Local Disciplinary Committee, on which those three members who "disciplined" me, Ms. Duhamel, Mr. Grimard and Mr. Maras, sat prior to the 2011 Convention, has been abolished.

(translation)

[19] Mr. Thibeault described the remedy he was seeking to Mr. Kuehnbaum:

I therefore ask that the 405 Local Disciplinary Committee on which Ms. Duhamel, Mr. Grimard and Mr. Maras sat be declared abolished as of the date Joint Resolution No. 2 was passed, and **I ask that you accordingly declare the penalty I was given on July 25, 2012**, by those three members of the defunct 405 Local Disciplinary Committee **to be ultra vires**.

(translation; emphasis added)

[20] Neither Mr. Kuehnbaum nor any other representative at CUPW responded to Mr. Thibeault's letter. In its response to the complaint, CUPW argued that Mr. Thibeault's August 12, 2012, letter had not been a proper appeal under section 8.30 of its national constitution and that Mr. Thibeault also had not respected the 15-day time limit set out in that section:

8.30 The party who wishes to appeal before the Appeal Board shall forward to the National Secretary-Treasurer a written notice to this effect within 15 days after the decision rendered by the Local National Constitution Disciplinary Committee is received by the appellant. The National Secretary-Treasurer will immediately forward a copy of the notice of appeal to the other party, to the Secretary-Treasurer of the Local and to the Chairperson of the Appeal Board. The National Secretary-Treasurer shall also forward a copy of the Disciplinary Committee's decision and the record of the hearing to the Chairperson of the Appeal Board.

(emphasis added)

[21] When Mr. Thibeault did not receive any response from CUPW, he proceeded to draft the complaint in the instant matter. The Board received Mr. Thibeault's complaint on May 16, 2013.

III. Procedural Issue

[22] In his letter of July 16, 2013, Mr. Thibeault objected to three letters filed by CUPW. Those letters had arrived on the same day as or after Mr. Thibeault's June 26, 2013, reply. Mr. Thibeault asked that the Board not take those letters into consideration or, if it did, that it allow him to respond further. The Board has decided to dismiss Mr. Thibeault's objection.

[23] CUPW's letter of June 26, 2013, simply added a document omitted from CUPW's response of June 14, 2013. The June 26, 2013, letter described CUPW's decision in January 2012 to allow an LDC to decide any matters pending prior to the amendments to the national constitution. Mr. Thibeault's submissions confirm that he knew of and had contested this CUPW decision.

[24] CUPW's letter of July 2, 2013, added no new information. It merely included another copy of the letter previously filed on June 26, 2013.

[25] CUPW's letter of July 9, 2013, commented on the letter by the Board's Investigating Officer (IO), in which the parties' pleadings were summarized. The IO's letter had expressly given the parties an opportunity to comment.

[26] The Board is satisfied that the parties had a fair opportunity to comment on each other's positions during the written pleading process. CUPW's letters, one of which was provided at the invitation of the Board, did not add anything new or prejudice Mr. Thibeault in any way.

[27] Mr. Thibeault's objection is accordingly dismissed.

IV. Analysis

[28] For ease of reference, section 95(g) reads as follows:

95. No trade union or person acting on behalf of a trade union shall

...

(g) take disciplinary action against or impose any form of penalty on an employee by applying to that employee in a discriminatory manner the standards of discipline of the trade union.

[29] Section 95(g) focuses on two elements:

- 1- a trade union's standards of discipline;
- 2- whether they were applied in a discriminatory manner against a complainant.

[30] Sections 97(4) and (5) of the *Code* establish certain preconditions for a complainant to file a complaint with the Board alleging a violation of section 95(g):

97(4) Subject to subsection (5), **no complaint shall be made to the Board** under subsection (1) on the ground that a trade union or any person acting on behalf of a trade union has failed to comply with paragraph 95(f) or (g) **unless**

(a) The complainant has presented a grievance or appeal in accordance with any procedure that has been established by the trade union and to which the complainant has been given ready access;

(b) the trade union

(i) has dealt with the grievance or appeal of the complainant in a manner unsatisfactory to the complainant, or

(ii) has not, within six months after the date on which the complainant first presented their grievance or appeal pursuant to paragraph (a), dealt with the grievance or appeal; and

(c) the complaint is made to the Board not later than ninety days after the first day on which the complainant could, in accordance with paragraphs (a) and (b), make the complaint.

(5) The Board may, on application to it by a complainant, determine a complaint in respect of an alleged failure by a trade union to comply with paragraph 95(f) or (g) that has not been presented as a grievance or appeal to the trade union, if the Board is satisfied that

(a) the action or circumstance giving rise to the complaint is such that the complaint should be dealt with without delay; or

(b) the trade union has not given the complainant ready access to a grievance or appeal procedure.

(emphasis added)

[31] Depending on the facts of each case, the Board may, under sections 97(4) and (5) of the *Code*, have to consider some of the following questions:

- i) Did the complainant first present a grievance or appeal under the trade union's established procedure [97(4)(a)]?
- ii) Did the complainant have "ready access" to that procedure [97(4)(a)]?
- iii) Did the trade union deal with the grievance or appeal [97(4)(b)(i)]?
- iv) Did the trade union deal with the complainant's grievance or appeal within six months [97(4)(b)(ii)]?
- v) Did the complainant file the complaint with the Board within 90 days after the first day on which he could do so, pursuant to the above procedural preconditions [97(4)(c)]?
- vi) Notwithstanding section 97(4), should the Board nonetheless hear the complaint
 - i) because the action or circumstance giving rise to the complaint is such that the complaint should be dealt with without delay [97(5)(a)];
 - ii) because the complainant was not given "ready access" to the trade union's grievance or appeal procedure [97(5)(b)]?

A. Does section 97(4) give rise to a cause of action?

[32] Mr. Thibeault argued in his complaint that CUPW had violated section 97(4) of the *Code* by failing to deal with his appeal within the six-month time frame contemplated by section 97(4)(b)(ii). This argument, with respect, misconstrues the purpose of section 97(4).

[33] The Legislator added procedural requirements that must be met before a complaint alleging a violation of sections 95(f) and (g) can be filed with the Board. These procedural requirements oblige union members first to follow internal trade union procedures.

[34] Accordingly, the first step to contest a trade union's penalty or disciplinary action takes place internally rather than before the Board.

[35] In exceptional circumstances, however, section 97(5) gives the Board discretion to hear a complaint notwithstanding a complainant's failure to satisfy the requirements of section 97(4).

[36] However, section 97(4) does not create a distinct *Code* violation. A trade union does not violate the *Code* if it fails to deal with a grievance or an appeal within six months.

[37] Rather, failure to do so merely starts the time period during which a complainant may file a complaint with the Board. The Board accordingly dismisses Mr. Thibeault's allegation that CUPW violated section 97(4) of the *Code*.

B. Did Mr. Thibeault meet the requirements of section 97(4) of the *Code*?

[38] In accordance with section 97(4)(b)(ii), Mr. Thibeault waited six months for CUPW to deal with his appeal. When CUPW failed to deal with the matter by February 15, 2013, Mr. Thibeault filed his complaint, on May 16, 2013, 90 days after the February 15, 2013, deadline.

[39] Mr. Thibeault complied with the timeliness requirement of section 97(4) of the *Code*.

[40] CUPW submitted in its response of June 14, 2013, that Mr. Thibeault had not filed a proper appeal under section 8.30 of its national constitution.

[41] The Board has difficulty with CUPW's argument. Section 8.30, which is reproduced again here for ease of reference, requires an appellant to write to either CUPW's Secretary-Treasurer or to its National Secretary-Treasurer:

8.30 The party who wishes to appeal before the Appeal Board shall forward to the National Secretary-Treasurer a written notice to this effect within 15 days after the decision rendered by the Local National Constitution Disciplinary Committee is received by the appellant. The National Secretary-Treasurer will immediately forward a copy of the notice of appeal to the other party, to the Secretary-Treasurer of the Local and to the Chairperson of the Appeal Board. The National Secretary-Treasurer shall also forward a copy of the Disciplinary Committee's decision and the record of the hearing to the Chairperson of the Appeal Board.

(emphasis added)

[42] Mr. Thibeault wrote to Mr. Kuehnbaum, the National Secretary-Treasurer. Section 8.30 makes provision for different internal procedures when this type of letter is received. However, it seems that nothing was done. Mr. Thibeault was not even sent an acknowledgment letter.

[43] CUPW never wrote to advise Mr. Thibeault that it did not consider that he had filed a proper appeal under section 8.30. That position first came to light when CUPW responded to Mr. Thibeault's complaint to the Board.

[44] CUPW further suggested that Mr. Thibeault's internal appeal had been filed outside the 15-day time limit provided for in section 8.30 given that the original LDC decision had been made in May 2012. However, when Mr. Thibeault filed his complaint, he attached a copy of the LDC's decision of July 25, 2012 (*supra*) that imposed a six-month bar commencing on July 25, 2012. No evidence was presented to show that Mr. Thibeault's letter of August 12, 2012, to challenge his suspension of July 25, 2012, was untimely.

[45] The above facts raise the question of whether CUPW provided Mr. Thibeault with "ready access" to a grievance or appeal procedure. CUPW failed to respond to Mr. Thibeault's appeal in any way other than in its response to this complaint. The expression "ready access" is used in both sections 97(4) and (5) of the *Code*.

[46] Mr. Thibeault's letter of August 12, 2012, to Mr. Kuehnbaum clearly showed that Mr. Thibeault was seeking to have CUPW rescind the LDC's disciplinary action of July 25, 2012. No one ever responded to that letter on behalf of CUPW.

[47] While CUPW did not explicitly deny Mr. Thibeault ready access to the appeal process, in the Board's view, its silence and failure to act upon receipt of his appeal letter had the same effect. Mr. Thibeault's attempt to contest the LDC's decision of July 25, 2012, was ignored, without any explanation.

[48] Consequently, in addition to finding that Mr. Thibeault respected the procedural requirements and time limit under section 97(4), the Board is satisfied that, in any case, Mr. Thibeault was not given "ready access" to CUPW's appeal procedure. Accordingly, whether it be under section 97(4) or under section 97(5), the Board can entertain the merits of Mr. Thibeault's complaint.

C. Section 95(g): The Board's Role

[49] Mr. Thibeault's complaint raises questions regarding the extent of the Board's oversight role in regard to internal trade union affairs. Pursuant to section 95(g), the Board is required under the *Code* to determine whether CUPW applied its standards of discipline to Mr. Thibeault in a discriminatory manner.

[50] In his complaint, however, Mr. Thibeault asks that the Board determine whether the October 2011 amendments to CUPW's national constitution made the LDC's disciplinary action "*ultra vires*." In other words, Mr. Thibeault alleges that the LDC had no legal authority to act after CUPW amended its national constitution in October 2011.

[51] In the context of a section 95(g) complaint, is the Board the proper forum to make a declaration about the legal validity or, subsidiarily, the proper interpretation of a trade union's national constitution?

[52] In *Berry v. Pulley*, 2002 SCC 40, the Supreme Court of Canada (SCC) commented on the legal status of trade unions and the remedies available if there is a breach of a union member's contractual rights:

63 However, this is not to say that union members do not have some obligations *inter se*. By joining a union, the member agrees to follow the rules of the union, and, through the common bond of membership, union members have legal obligations to one another to comply with these rules. **If there is a breach of a member's constitutional rights, this is a breach by the union, and the union may be liable to the individual. Similarly, the disciplinary measures in the constitution can be imposed by the union on a member who contravenes the union's rules. A failure by the union to follow these disciplinary procedures may cause it to breach its contractual obligations to the other members, giving rise to corresponding contractual remedies.**

64 **In addition to potential internal procedures, a failure by the union to insist on compliance with the constitution or impose disciplinary measures for its breach may allow members to initiate proceedings either at the Canada Industrial Relations Board, or the courts, depending on the nature of the complaint.** Aside from actions against the union, a member who is harmed by the breach of the union's rules by another member may, if the requisite elements are present, have an action in tort against that member.

(emphasis added)

[53] As the SCC noted, a trade union's failure to follow its national constitution may give rise to an action for breach of contract. The SCC also noted that, depending on their nature, certain breaches may give rise to complaints to the Board.

[54] Earlier cases distinguished between matters for the courts and matters that fell under the *Code*.

[55] In *Pilette c. Syndicat des postiers du Canada*, [1991] R.J.Q. 1015 (*Pilette*), the Quebec Superior Court distinguished between the jurisdiction of the Board's predecessor, the Canada Labour Relations Board (CLRB), and that of a court. The Court quoted from various CLRB decisions that described its limited role over the internal affairs of a trade union.

[56] The CLRB limited its involvement to the specific circumstances described in the *Code*, such as the discriminatory application of a trade union's discipline standards. The *Code's* prohibitions existed as a counterweight to the exclusive representation rights that the *Code* grants a trade union.

[57] But the *Code* did not grant the Board a general power of oversight over the internal workings of a trade union, which is, essentially, an unincorporated association falling within provincial jurisdiction.

[58] In *Pilette, supra*, the Court stated the following:

[15] **There must therefore be no ambiguity as to the nature of the Board's power. The Board has no control over the nature of the trade union's internal constitution.** The decision in *Matus* is clear in this regard. It is reported by Carrothers, Palmer and Rayner as follows:

After concluding, on the basis of *Johnston v. Amalg. Transit Union and B.C. Hydro and Power Authority*, that the Board had no roving commission to regulate the internal affairs of union, the Board stated that it had a limited role in supervising union affairs, to the extent that they are regulated by specific provisions of the *Labour Code*.

The courts alone have the authority to interpret the terms and scope of the rules binding the members to their union:

Courts have been adamant that a domestic tribunal such as, say, a disciplinary body of a trade union, cannot arrogate to itself the right to interpret the contractual terms of the association. The courts are to be the final arbiters of how the contractual terms binding the members, i.e., the rules, should be interpreted. This, of course, allows them—should they so desire—to imply terms into the contract between the members.

[16] The CLRB took a similar view in a recent decision. In *Saunders v. Canadian Union of Postal Workers*, it stated the following:

The Canada Labour Relations Board has no general mandate to supervise or police union observance of constitutions, by laws and rules of order. There are other forums where non-observance of such may be challenged.

The Board's involvement in the internal affairs of a union is quite specific, restricted and specialized and in respect of section 185 (f) and (g) it has to do with membership rules or disciplinary standards being applied in a "discriminatory" manner.

[17] Consequently, it is the trade union's responsibility to lay down its own rules in regard to internal discipline. And the Board will intervene only where those rules are applied in a discriminatory manner within the meaning of section 95 of the CLC. That is the extent of its authority in this area. In all other cases of union non-compliance with the rules, authority rests with the courts. But how is the word discrimination in section 95 to be defined?

(translation, emphasis added)

[59] The wording of section 95(g) implies to a certain extent that there is no dispute about the validity of the trade union's "standards of discipline." The Board's focus in section 95(g) matters is instead whether the trade union, in taking disciplinary action against, or imposing any form of penalty on, an individual applied its established standards of discipline in a discriminatory manner.

[60] The CLRB commented on this question in *Conlin* (1994), 95 di 145; and 27 CLRBR (2d) 149 (CLRB no. 1088) (*Conlin*):

... The Board is not mandated to interfere in internal union matters, and this clearly includes the interpretation of the union's Constitution. In cases such as the present, the Board's authority extends only to ensuring that the terms of the Constitution are applied by the union in a manner that is free from discriminatory practices. ...

Although it is possible that inappropriate interpretations of the Constitution by the designated officer of the union may corroborate other evidence of discrimination, an adverse interpretation of the Constitution, on its own, will not be interfered with by the Board nor will it ordinarily lead, without further evidence, to the conclusion that the adverse interpretation was invoked simply to discriminate against a specific individual.

(pages 149; and 153)

[61] As noted in *Conlin, supra*, the Board, in rare cases, might consider whether an interpretation of the national constitution is so extreme that that fact, along with others, constitutes sufficient evidence of a trade union having treated an employee in a discriminatory manner. But that is not

the case in the instant matter, where the dispute concerns whether an LDC had the appropriate authority under CUPW's constitution to make the decisions it made.

D. Decision

[62] Mr. Thibeault has not demonstrated that CUPW violated section 95(g). He has argued that CUPW abolished the LDCs established under article 8 of its national constitution at its convention in October 2011. He indicated to CUPW that any action taken by the LDCs after the amendments had been made were "*ultra vires*."

[63] CUPW, on the other hand, has argued that it subsequently clarified that the LDCs would dispose of any pending complaints filed before the October 2011 amendments to the national constitution.

[64] This contractual dispute between the parties concerns the validity and interpretation of certain provisions of CUPW's national constitution. The Board's role under section 95(g) does not extend to resolving these types of disputes (see *Conlin, supra*).

[65] Mr. Thibeault has not presented any evidence that CUPW treated other members in similar situations differently from the way he was treated. Rather, the sole basis for his complaint is his view that CUPW abolished the LDCs in October 2011 and, consequently, no LDC had authority to impose any discipline on him.

[66] That type of dispute, involving the proper interpretation of CUPW's national constitution, is for a court to decide. Indeed, there have been many court cases involving disputes about a trade union's authority under its national constitution (see, for example, *Birch v. Union of Taxation Employees, Local 70030*, (2008), 288 D.L.R. (4th) 424, upheld by the Ontario Court of Appeal in *Birch v. Union of Taxation Employees, Local 70030*, 2008 ONCA 809).

[67] Even if the Board were wrong in regard to the scope of section 95(g), the absence of any evidence of discrimination with respect to the application of CUPW's standards of discipline would still end the matter.

[68] The Board readily understands the frustration a complainant may experience when told, after putting considerable effort into his written pleadings, that the Board is not the proper forum to resolve the dispute.

[69] Nonetheless, this Board and its predecessor, the CLRB, have been consistent for decades on the extent of their jurisdiction under section 95. There is no reason to depart from this interpretation of section 95 of the *Code*.

[70] This is a unanimous decision of the Board.

Translation

Graham J. Clarke
Vice-Chairperson

André Lecavalier
Member

Norman Rivard
Member